

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Theatre Techniques Associates, Inc. : AFFIDAVIT OF MAILING  
  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article(s) 9A of the Tax :  
Law for the Period Ending 6/30/82. :  
\_\_\_\_\_:

State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 14th day of November, 1986, he/she served the within notice of Decision by certified mail upon Theatre Techniques Associates, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

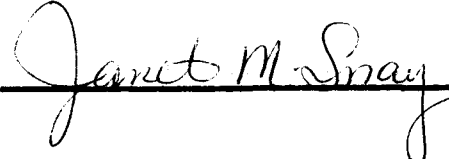
Theatre Techniques Associates, Inc.  
P.O. Box 335, Shore Road  
Cornwall-on-Hudson, New York 12520

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
14th day of November, 1986.

  
\_\_\_\_\_  
Authorized to administer oaths  
pursuant to Tax Law section 174

  
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STATE OF NEW YORK

STATE TAX COMMISSION

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for Redetermination of a Deficiency or Revision :  
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State of New York :

ss.:

County of Albany :


David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 14th day of November, 1986, he served the within notice of Decision by certified mail upon Morton G. Millstein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morton G. Millstein  
Millstein & Company  
90 East Main Street  
Washingtonville, NY 10992

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
14th day of November, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

November 14, 1986

Theatre Techniques Associates, Inc.  
P.O. Box 335, Shore Road  
Cornwall-on-Hudson, New York 12520

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Morton G. Millstein  
Millstein & Company  
90 East Main Street  
Washingtonville, NY 10992

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

THEATRE TECHNIQUES ASSOCIATES, INC.

DECISION

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Fiscal Year  
Ended June 30, 1982.

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Petitioner, Theatre Techniques Associates, Inc., P.O. Box 335, Shore Road, Cornwall-on-Hudson, New York 12520, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended June 30, 1982 (File No. 55745).

A hearing was held before Sandra F. Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 15, 1986 at 1:45 P.M., with all briefs to be submitted by July 7, 1986. Petitioner appeared by Millstein & Company, P.A. (Morton G. Millstein, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

#### ISSUE

Whether the property upon which petitioner sought an investment tax credit was used by petitioner principally in the production of goods by manufacturing.

#### FINDINGS OF FACT

1. On September 12, 1984, the Audit Division issued a Notice of Deficiency against petitioner, Theatre Techniques Associates, Inc., claiming a deficiency of \$343.00 for the fiscal year ended June 30, 1982 plus interest.

2. For the fiscal year ended June 30, 1981, petitioner claimed an investment tax credit of \$13,762.00 allocated as follows:

Building	\$10,000.00
Building improvements:	
flooring	1,578.00
roofing	998.00
masonry	163.00
plumbing	746.00
doors	52.00
Forklift	60.00
Tools	165.00

The deficiency at issue represents the amount of the claimed credit carried forward to fiscal year ended June 30, 1982.

3. Petitioner was a contractor providing stage sets and scenery for Broadway and Off Broadway shows, road companies and other theatrical productions. It has provided the sets for "Cats", "42nd Street" and "Duet for One". The Audit Division disallowed petitioner's entire claim for an investment tax credit on the grounds that: (1) The construction of stage sets does not constitute the production of goods by manufacturing, and (2) the property upon which the credit was claimed was leased to petitioner's subcontractors and was thus unavailable to the petitioner with respect to the credit.

4. Petitioner did not actually build stage sets. As a contractor, it prepared competitive bids, executed contracts with theatrical producers for the provision of stage sets, subcontracted with other companies for the actual work involved in building the sets, supervised the work of the subcontractors and remained ultimately responsible for the delivery of the completed sets according to the contract's specifications.

5. Petitioner's primary subcontractors were F.F. Theatrical Services, Inc. ("F.F."), Ebco Construction Company ("Ebco") and Doklo Fabricators, Inc. ("Doklo"). In addition, petitioner was owned entirely by these three corporations.

6. Petitioner entered into written contracts with F.F., Ebco and Doklo for the construction of sets. Depending on the size and design of a particular

set, petitioner used one or all of the subcontractors. Petitioner was entirely responsible for deciding which subcontractor or subcontractors to use on a project. If a project called for work outside the expertise of the three primary subcontractors, other parties would be used.

7. The sets were built by F.F., Ebco and Doklo in the building owned by petitioner, upon which the investment tax credit is claimed. The building contained approximately 65,000 square feet. About 75 percent of the space was used by the subcontractors for storage of tools and materials and construction of the sets. Ten percent was used by petitioner for storage of tools and materials. The remainder was used by petitioner for office space and other miscellany.

8. There were no formal leases or written rental agreements between petitioner and its subcontractors, but there was what petitioner's comptroller described as "sharing of the costs". Petitioner paid the mortgage on the building as well as insurance and maintenance costs. F.F., Ebco and Doklo paid petitioner an agreed upon amount each month and contributed to the upkeep of the building, real estate taxes and insurance as needed. It is petitioner's position that F.F., Ebco and Doklo were the owners of the building because they were petitioner's shareholders.

9. Petitioner's subcontractors built the stage sets, consisting of scenery, backdrops, furniture, props, etc. on a platform called an operating deck. The sets were built from wood, steel, plastic and other materials to give whatever appearance the designer desired. When a set was completed, it was disassembled, usually by petitioner, and the pieces, including the operating deck, were shipped to the appropriate theater. The operating deck was laid on top of the theater's stage, and the sets and scenery were reassembled on it.

If the location of a show changed, petitioner disassembled the set, transported the pieces and reassembled the set in a new location. At times, all or part of the assembly and disassembly of sets was done by the employees of the theatrical producer.

#### CONCLUSIONS OF LAW

A. That Tax Law §210.12 allows a taxpayer a credit against tax with respect to qualified production facilities acquired or constructed after December 31, 1968. Tangible property, including buildings and structural components, qualifies for the credit if, among other things, it is principally used by the taxpayer in the production of goods by manufacturing, processing or assembling (Tax Law §§210.12[a][b]).

B. That 20 NYCRR 5-2.4(c) provides as follows:

"The term principally used means more than 50 percent. A building or addition to a building is principally used in production where more than 50 percent of its usable business floor space is used in storage and production. Floor space used for bathrooms, cafeterias and lounges is not usable business floor space. Space used for offices, accounting, sales and distribution is not used in production.

C. That the investment tax credit is not available with respect to property leased to any other person or corporation; furthermore, "any contract or agreement to lease or rent or for a license to use such property shall be considered a lease" (Tax Law § 210.12 [d]). Accordingly, the agreement between petitioner and each of its subcontractors to "share the costs" of the building constituted a lease within the meaning and intent of Tax Law § 210.12(d), causing approximately 75 percent of the floor space of the building and related improvements used by the subcontractors to be unavailable for the credit. Even if the remaining 25 percent of the floor space was used by petitioner in the production of goods, this would not satisfy the requirement that such a building

be "principally used by the taxpayer in the production of goods" (Tax Law § 210.12[b]).

D. That Tax Law §210.12(b) defines manufacturing as "the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment." Petitioner's own activities merely included assembly, disassembly and transportation of sets after they were completed. These activities did not give "new shape," "new quality" or "new combinations" to the already completed product. Therefore, the forklift and other tools used by petitioner to assemble and disassemble sets do not qualify for the credit.


E. That inasmuch as the construction of the stage sets was done by petitioner's subcontractors and not by petitioner, it is unnecessary to determine whether or not such activity constitutes the production of goods by manufacturing, assembling or processing.

F. That the petition of Theatre Techniques Associates, Inc. is denied, and the Notice of Deficiency issued on September 12, 1984 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER